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No. 96-684

In the Supreme Court of the United States

OCTOBER TERM, 1996

JANET JONES, PETITIONER

v.

MARVIN T. RUNYON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in an employment discrimination case brought by a federal employee under Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, the federal employee must exhaust the administrative remedies as set forth in 42 U.S.C. 2000e-16(c) prior to filing a civil action under Title VII in federal court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B at 1-19) is reported at 91 F.3d 1398. The opinion of the district court (Pet. App. A at 1-9) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1996. The petition for a writ of certiorari was filed on October 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1990, petitioner, a United States Postal Service employee, filed an administrative complaint

with the Postal Service, alleging that she had been the victim of discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. B at 7; C.A. App. 51-56. Petitioner alleged that a co-worker had been promoted "because of situations in which employment opportunities and benefits were granted because of [a supervisor's] love for [the co-worker]." C.A. App. 52. Petitioner claimed that her rights had been violated "according to Section 703 of title VII of the civil rights act" which applies to a situation "in which employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or request for sexual favors. The employer may be held liable for unlawful sex discrimination against other employees who were qualified for, but denied the employment opportunity or benefit." *Id.* at 55 (paraphrasing 29 C.F.R. 1604.11(g)).

The Postal Service's equal employment opportunity (EEO) office acknowledged receipt of petitioner's administrative complaint and informed petitioner that it would investigate her claim that she was denied a promotion because of discrimination based on "Sex (female)." C.A. App. 174. Petitioner responded to the Postal Service's notice, informing it that its definition of her claim was inaccurate. She wrote:

> The type of harassment you have listed is sex-female, this is incorrect. I was not discriminated against because of being female. I was discriminated against because of a relationship between [a supervisor] and [a co-worker]. I am filing under sexual harassment in accordance with Sec. 703 of title VII.

Id. at 175; Pet. 6. Petitioner again paraphrased the sexual harassment regulation, 29 C.F.R. 1604.11(g). C.A. App. 175; Pet. 6. In response to petitioner's letter, the Postal Service's EEO office changed the purview of its investigation of petitioner's administrative complaint to an investigation of her alleged denial of a promotion because of sexual harassment. C.A. App. 176-179.

After investigation and an unsuccessful attempt to resolve the matter informally, the Postal Service notified petitioner that it proposed to close her case with a finding of no discrimination based on sexual harassment. C.A. App. 241-243. It concluded that the record was "devoid of evidence that any employment opportunities or benefits were granted to [the coworker] on the basis of her submission to sexual advances or requests for sexual favors." *Id.* at 241. It also explained that, assuming arguendo that the coworker "was selected on the basis of sexual favoritism, this alone does not necessarily violate Title VII. The [Equal Employment Opportunity] Commission has adopted the position that Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a 'paramour' does not violate Title VII since *both men and women are disadvantaged for reasons other than* their gender." *Ibid.* The Postal Service added that, in the instant case, three officials were involved in selecting the persons to be promoted and that all three had agreed on those promoted. *Id.* at 242. It concluded that "a preponderance of the evidence shows that management's actions were taken for non-discriminatory reasons and that you have not satisfied your burden of proving that the Postal Service intention-

ally discriminated against you." *Ibid.* The Postal Service adopted the recommended disposition as its final agency decision. *Id.* at 245.

b. Petitioner appealed to the Equal Employment Opportunity Commission (EEOC) (C.A. App. 250) which affirmed the agency's decision (*id.* at 264-274). The EEOC reviewed petitioner's sexual harassment claim regarding the favoritism accorded her co-worker under both a quid pro quo and hostile work environment analysis, as set forth in *Meritor Savings Bank, F.S.B.* v. *Vinson*, 477 U.S. 57 (1986). The EEOC expressly found that petitioner was not alleging that she was personally subjected to quid pro quo sexual harassment, but rather that she was discriminated against because of the favoritism accorded the co-worker. C.A. App. 270. The EEOC recognized that favoritism based on coerced sexual conduct may constitute quid pro quo harassment if other qualified female employees who were denied certain employment benefits can establish that sex was, in general, made a condition for receiving such employment benefits. *Ibid.* The EEOC noted, however, that an isolated instance of preferential treatment based on a consensual romantic relationship does not discriminate against men or women in violation of Title VII because both groups are equally disadvantaged by the favoritism. *Ibid.* (citing *Miller* v. *Aluminum Co. of America*, 679 F. Supp. 495 (W.D. Pa.), aff'd mem., 856 F.2d 184 (3d Cir. 1988); *DeCintio* v. *Westchester County Med. Ctr.*, 807 F.2d 304 (2d Cir. 1986), cert. denied, 484 U.S. 825 (1987); *Policy Guidance on Employer Liability under Title VII for Sexual Favoritism*, EEOC Notice No. N-915-048, (Jan. 12, 1990)). The EEOC concluded that, after a thorough review of the entire record, there was no

persuasive evidence that the co-worker and supervisor had been engaged in a romantic relationship (coerced or consensual), that the co-worker had submitted to the supervisor's advances, or that the supervisor had made the co-worker's submission to his advances a condition for the granting of employment benefits generally, or the disputed promotion in particular. C.A. App. 271.

The EEOC also concluded that petitioner had not made out a hostile work environment violation of Title VII based on the supervisor's alleged favoritism toward her co-worker because of a romantic relationship, finding that petitioner had "not alleged, nor is there other evidence suggesting, that the alleged behavior of the [supervisor] was more widespread or was extended to employees other than the [co-worker], or that supervisors generally conveyed the message that female employees could be promoted by engaging in sexual conduct." C.A. App. 271-272. The EEOC pointed to the promotion of other females and males at the same time as the challenged promotion of the particular co-worker[1] and to the fact that there was no evidence that any of them were engaged in relationships with the supervisors. *Id.* at 272. The EEOC held that the supervisor's conduct had not been sufficiently severe or pervasive to create a hostile

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[1] The EEOC explained that petitioner was one of 13 applicants (eight females, five males) referred for consideration by the promotion board (one female, two males), and that six applicants (three female, three male) were promoted by the final selection committee (three males (including the supervisor alleged to be romantically involved with one of the females promoted)). C.A. App. 266. Two higher level Postal Service officials affirmed the choices. *Id.* at 267 n.4.

working environment. *Ibid.*[2] The EEOC also rejected, as not supported by the record, petitioner's contention that the Postal Service was biased and did not conduct a thorough investigation. *Id.* at 273.

c. Petitioner filed a request to reopen with the EEOC, alleging, inter alia, that the EEOC should have applied the analysis set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), instead of the *Meritor Savings Bank* analysis. C.A. App. 255-260. Petitioner claimed that she should prevail under the *McDonnell Douglas* analysis because she had made out a prima facie case, and the Postal Service did not have a legitimate business reason for selecting the co-worker for promotion. *Ibid.* Petitioner also sought to reopen her case based on an allegation of inadequate investigation.

The EEOC denied petitioner's request to reopen (C.A. App. 275-281), concluding, inter alia, that its previous decision properly treated petitioner's complaint as an allegation of sexual harassment based on favoritism to a co-worker and correctly concluded with a finding of no discrimination (*id.* at 279). The EEOC emphasized the fact that on two occasions, first in her response to the Postal Service and again

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[2] The EEOC noted that "in her affidavit, [petitioner] raised allegations of sexual harassment when, in 1987, several supervisors made inappropriate remarks to [her] about her personal life as it related to her promotability, and when on an unspecified date the [supervisor] made a remark to [petitioner] which she interpreted to be a sexual advance." C.A. App. 269. The EEOC found that "these allegations were not raised by [petitioner] in her formal complaint, which concerns only her nonselection for the position of Supervisor, Mails. There is no evidence that these allegations were timely raised with an EEO Counselor; therefore, they are not presently at issue." *Ibid.*

in her appeal brief to the EEOC, petitioner expressly argued that her case should be reviewed under Title VII sexual harassment law and the EEOC's sexual harassment regulation relating to benefits granted to another employee because of that employee's submission to the employer's sexual advances, 29 C.F.R. 1604.11(g). C.A. App. 279. The EEOC rejected petitioner's attempt to recast her complaint as one of unlawful disparate treatment based on sex. *Ibid.* The EEOC also noted that, even if petitioner's case were analyzed under *McDonnell Douglas*, petitioner would not prevail because she could not make out a prima facie case and had not established that the Postal Service's explanation was a pretext for discrimination. *Id.* at 280.

2. Following the EEOC's affirmance of the Postal Service's decision, petitioner filed the instant action in the United States District Court for the Western District of Oklahoma, claiming that she had been subjected to discrimination on the basis of sex by the Postal Service, in violation of Title VII. In an amended complaint, petitioner alleged that she had been personally subjected to quid pro quo sexual harassment and a hostile work environment. Pet. App. A at 2-3. Specifically, petitioner alleged, inter alia: That two weeks before her promotion interview, she had been "asked by her supervisor to engage in sexual intercourse, which she refused"; that one of the reasons she had not been selected for promotion was because of her "refusal to submit to the sexual demands of her supervisor"; that "a qualification for the position was submission to the sexual advances of her supervisor"; that "the overall environment was such that female employees were not promoted on an equal basis unless they submitted to unwanted sexual

demands of supervisors"; that she "was subjected to unwanted sexual advances on a continuing basis until she filed her EEO complaint against the Postal Service"; and that "the practice of female employees submitting themselves to unwelcome sexual advances from supervisors was a condition precedent to promotion." C.A. App. 106-108. Petitioner also repeated the claim from her administrative complaint that her supervisor's decision to promote her co-worker was "based upon his romantic involvement with the successful candidate." *Id.* at 107-108.

In a second count, petitioner alleged that the Postal Service had retaliated against her for filing her complaint of discrimination. Pet. App. A at 3-4. The alleged retaliation included not giving petitioner a step increase and, ultimately, suspending her. Pet. App. B at 13.

The district court dismissed the complaint. Pet. App. A at 1-9. The court held that it lacked subject matter jurisdiction because petitioner had not exhausted administrative remedies. *Id.* at 4, citing *Brown* v. *General Services Administration*, 425 U.S. 820 (1976), and *EEOC* v. *Shell Oil Co.*, 466 U.S. 54 (1984). The court found that petitioner's administrative proceeding had been based on her allegation of sex discrimination due to the promotion of a co-worker who had been given preferential treatment because she was romantically involved with the supervisor, Pet. App. A at 4—*i.e.* a claim "that *another* individual had been promoted unfairly because of *that* individual's relationship with her supervisor," *id.* at 7. By contrast, petitioner's district court "cause of action for *quid pro quo* sexual harassment alleged in Count I of the first amended complaint involves plaintiff herself, not some other

individual." *Ibid.*[3] The court concluded that that claim and petitioner's retaliation claim had not been presented administratively. *Id.* at 8. Therefore, because administrative exhaustion is a jurisdictional prerequisite to suit in federal court under Title VII, the court held that it had no jurisdiction over petitioner's case. Pet. App. A at 8-9 (citing *Sampson* v. *Civiletti*, 632 F.2d 860 (10th Cir. 1980)).

3. The court of appeals affirmed. Pet. App. B at 1-19. The court found that, in her formal EEOC complaint, petitioner's claim that her rights had been violated was based on the allegation that a co-worker was promoted instead of petitioner because the supervisor had a romantic relationship with the co-worker. *Id.* at 9. The court noted that petitioner specifically had disavowed in the administrative proceedings that her claim there was based on sexual harassment discrimination against her personally on account of her sex. *Id.* at 9 n.2, 12. The court also pointed to the EEOC's ruling that petitioner's administrative claim was limited to her concern with the denial of a

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[3] The court found that "[t]he only hint of harassment involving [petitioner] personally" in the administrative proceeding was "reference to certain events for which the time and relationship to the disputed promotion are not specified." Pet. App. A at 4-5. The court concluded that the one allegation involving petitioner and the supervisor on an unspecified date was insufficient to advise the Postal Service or the EEOC that petitioner would pursue a quid pro quo sexual harassment claim based on that allegation. *Id.* at 6. The court also concluded that all but one of the allegations on which petitioner attempted to rely to demonstrate exhaustion of her new hostile environment claim were allegations relating to the romantic involvement of others in the workplace "which [petitioner] * * * stated is *not* the basis of her claim" in federal court. *Id.* at 7.

promotion and noted that any claim that petitioner belatedly tried to raise regarding a sexual advance directed toward her personally had not been timely raised in the administrative proceeding. *Id.* at 10. Thus, the court of appeals concluded that petitioner changed her complaint in the district court to allege quid pro quo sexual harassment and the existence of a hostile work environment that she had not raised administratively. *Id.* at 11-12.[4] Petitioner's failure to exhaust administrative remedies for those claims required the court to affirm the district court's dismissal for lack of jurisdiction. *Id.* at 2-3 (citing *Sampson, supra*).[5]

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[4] The court of appeals stated that, to the extent petitioner reasserted before it the claim that she had, in fact, exhausted based on discrimination because of the relationship between a supervisor and co-worker, the court would not reach that claim because petitioner had not argued it before the district court. Pet. App. B at 12-13 n.3. The court of appeals also did not reach petitioner's claim of an inadequate administrative investigation because she had not raised it below. *Ibid.* In light of its ruling affirming the dismissal of the case, the court of appeals did not reach petitioner's claim regarding a jury trial. *Id.* at 19 n.7.

[5] The court of appeals adhered to prior circuit authority, holding that exhaustion of administrative remedies is a jurisdictional prerequisite to suit in federal court under Title VII. Pet. App. B at 3-6 n.1. The court noted, however, that some other circuits have concluded that the prerequisite of an EEOC filing "should be viewed merely in the nature of a condition precedent or an affirmative defense that can be waived." *Id.* at 3 n.1. The court concluded that the distinction regarding whether exhaustion was jurisdictional or could be waived "is immaterial with respect to [petitioner's] underlying claim for sex discrimination" because respondent asserted the ground in its motion to dismiss and there is no question of waiver here. *Id.* at 6 n.1.

With regard to petitioner's retaliation claim, the court of appeals stated that her failure to bring a second complaint before the EEOC to raise that claim was not necessarily dispositive because district courts may exercise ancillary jurisdiction over such claims that are reasonably related to exhausted claims. Pet. App. B at 13-15 & n.5. The court concluded, however, that exercise of ancillary jurisdiction was not appropriate where, as here, the underlying claim was not exhausted and therefore was not, itself, properly before the district court. *Id.* at 18.[6]

ARGUMENT

1. Petitioner contends (Pet. 9-10) that the Court should grant review in this case "to resolve a split between the federal circuit courts of appeal on whether or not subject matter jurisdiction in federal court can be invoked when there has been no filing with the EEOC." Petitioner relies (Pet. 12, 14-15) on the cases cited by the court of appeals below, indicating that the Fifth, Ninth and Eleventh Circuits have held that filing of an EEOC charge is not a jurisdictional prerequisite under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Petitioner also relies on (Pet. 10-18) *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), in which the Court held that the statutory time limit for filing charges with the EEOC under Section 2000e-5(e) is not

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[6] The court stated that, in this regard, if exhaustion of administrative remedies were not a jurisdictional prerequisite to suit in federal court, the district court would have had ancillary jurisdiction to consider the retaliation claim. Pet. App. B at 18-19 n.6.

jurisdictional, but rather is subject to tolling similar to a statute of limitations.

Petitioner's argument disregards the fact that the defendant against whom the Title VII claims were brought in this case is the United States Postal Service, not a private employer. The jurisdiction of district courts over Title VII claims brought against the Postal Service rests on 42 U.S.C. 2000e-16, not on 42 U.S.C. 2000e-5 (which establishes administrative and federal court jurisdiction over complaints against private employers), or 42 U.S.C. 2000e-2 (which prohibits discriminatory employment practices by private employers), as petitioner appears to suggest (Pet. 3).

As originally enacted in 1964, Title VII did not extend to discrimination by the federal government. Congress amended Title VII in 1972, however, to add a new section, Section 717, to require nondiscrimination in federal government employment. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111. That prohibition against discrimination in federal government employment is now set forth, as amended, in 42 U.S.C. 2000e-16, which provides, in relevant part, that:

> All personnel actions affecting employees * * * in military departments * * *, in executive agencies as defined in section 105 of title 5 * * *, in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress,

> shall be made free from any discrimination based on race, color, religion, sex, or national origin.

42 U.S.C. 2000e-16(a). Section 2000e-16(b) grants the EEOC the authority to enforce Section 2000e-16(a). Section 2000e-16(c) describes the complaint procedure to be followed by a federal employee, including the filing of a complaint with his or her employing agency, an optional appeal to the EEOC, and the right to file a suit in federal court upon the agency's or the EEOC's final disposition of the complaint, or failure to take final action on the complaint within a certain time period. Section 2000e-16(c) specifies that:

> Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the [EEOC] upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, * * * or after one hundred and eighty days from the filing of the initial charge with the department, agency or unit or with the [EEOC] on appeal * * * until such time as final action may be taken by a department , agency, or unit, *an employee* * * * *if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action* as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

42 U.S.C. 2000e-16(c) (emphasis added).

The text of Section 2000e-16(c) makes clear that a federal employee may proceed with a Title VII claim

in federal court only if that employee has pursued a complaint with his or her employing agency, and has either obtained an unfavorable final disposition or has been unable to obtain a timely decision. Congress thereby evidenced its intent that, as a condition of subjecting the federal government to suit in district court under Title VII, a federal employee must first file a complaint with his or her employing agency. *Brown* v. *General Services Administration*, 425 U.S. 820, 832 (1976). This Court has expressly recognized that Title VII "provides for a careful blend of administrative and judicial enforcement powers" in an enforcement system characterized by "balance, completeness, and structural integrity." *Id.* at 832-833. Moreover, the Court has emphasized "[t]he crucial administrative role that each agency * * * was given by Congress in the eradication of employment discrimination" under the statute. *Id.* at 833. Under *Brown*, the exhaustion of administrative remedies is a condition precedent to suit against the federal government under Title VII. *Ibid.* See also *Chandler* v. *Roudebush*, 425 U.S. 840, 852, 863 (1976).

Petitioner does not contend that there is a conflict in the circuits regarding exhaustion of administrative remedies prior to an action under Section 2000e-16 against the federal government. The cases petitioner identifies as presenting a conflict in the circuits are cases that did not involve the pursuit of unexhausted claims against the federal government. Most involve private employers as defendants. See *Womble* v. *Bhangu*, 864 F.2d 1212 (5th Cir. 1989); *Bullard* v. *Sercon Corp.*, 846 F.2d 463 (7th Cir. 1988); *Jackson* v. *Seaboard Coast Line R.R.*, 678 F.2d 992 (11th Cir. 1982); *Hrivnak* v. *First of Michigan Corp.*, 617 F. Supp. 990 (E.D. Mich. 1985). The defendant in

Davis v. *North Carolina Dep't of Correction*, 48 F.3d 134 (4th Cir. 1995), was an entity of a state government. Federal defendants were named in *Temengil* v. *Trust Territory of Pacific Islands*, 881 F.2d 647 (9th Cir. 1989), cert. denied, 496 U.S. 925 (1990), but the Title VII claims against the federal defendants were disposed of on a motion for summary judgment, not on a motion to dismiss for failure to exhaust. The *Temengil* court's discussion of exhaustion addressed only the dismissal on exhaustion grounds of claims against the government of the Northern Mariana Islands, which is legally distinct from the United States government. See *Temengil*, 881 F.2d at 653-654.

Application of those rulings in suits against employers other than the federal government would be inappropriate in the instant case, which involves a waiver of sovereign immunity by the federal government. "[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States* v. *Testan*, 424 U.S. 392, 399 (1976) (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). This Court has recognized that "[Section] 2000e-16(c) is a condition to the waiver of sovereign immunity and thus must be strictly construed." *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 94 (1990);[7] cf. *Lehman* v. *Nakshian*, 453 U.S. 156,

[7] In *Irwin*, the Court held that the time limitation for filing suit against the federal government in district court following the exhaustion of administrative remedies, as set forth in Section 2000e-16(c), is analogous to a statute of limitations so that an out-of-time filing is not necessarily a jurisdictional bar to the suit because equitable tolling may

160-161 (1981). Because administrative exhaustion is a condition of the United States' waiver of sovereign immunity under Title VII, the federal courts lack jurisdiction over unexhausted claims brought against the federal government under Section 2000e-16. See *Dollis* v. *Rubin*, 77 F.3d 777, 781 (5th Cir. 1995) (holding that plaintiff "satisfied the jurisdictional prerequisite of filing an administrative complaint" in regard to some, but not all, of her claims in an action against the Department of the Treasury); *Grier* v. *Secretary of Army*, 799 F.2d 721, 724 (11th Cir. 1986) (administrative exhaustion requirement in action against federal agency under Section 2000e-16 "is not a technicality," but rather is "part and parcel of the congressional design to vest in the federal agencies and officials engaged in hiring and promoting personnel 'primary responsibility' for maintaining nondiscrimination in employment"); *Edwards* v. *Department of the Army*, 708 F.2d 1344 (8th Cir. 1983)

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apply. *Irwin*, 498 U.S. at 95. The instant case, unlike *Irwin*, does not involve a time deadline for filing suit and thus does not raise concerns about the inconsistency in previous Court rulings dealing with the effect of time limits in suits against the federal government. *Id.* at 94. And the instant case does not involve the question the Court had left open prior to *Irwin* regarding whether equitable principles such as tolling apply against the government when a statutory filing deadline is involved. *Ibid.* Rather, the instant case involves the requirement that a federal employee pursue a complaint procedure in his or her employing agency before seeking relief in federal court. As noted above, the text of Section 2000e-16(c) indicates that Congress intended such an administrative exhaustion requirement to be a condition of its waiver of sovereign immunity that subjected it to suit under Title VII. Absent fulfillment of such a condition, the terms of the waiver have not been met and the district court lacks jurisdiction.

(federal employee Title VII suit must be dismissed if administrative remedies not exhausted); *Johnson* v. *Bergland*, 614 F.2d 415, 417 (5th Cir. 1980) (suit brought by federal employee against Secretary of Agriculture under Section 2000e-16 must be dismissed if administrative remedies not exhausted); *Hoffman* v. *Boeing*, 596 F.2d 683 (5th Cir. 1979) (federal employee required to exhaust administrative remedies prior to filing suit in district court against Department of the Navy under Section 2000e-16).[8]

2. Petitioner contends (Pet. 18-24) that the equal employment office of the Postal Service, with which she filed her initial administrative complaint, failed to advise and assist her properly in the framing of the issues through the administrative process. Petitioner complains (Pet. 19-21) about the particular EEO counselor/investigator assigned to the case, his

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[8] Although petitioner mentions (Pet. 7-8, 13, 16) her claim of "sexual harassment as processed through the EEOC, which involved [the co-worker and supervisor]," and which was, in fact, exhausted in the administrative proceedings, petitioner does not seek review of the district court's ruling dismissing that claim. The court of appeals declined to address that claim because petitioner had not pursued it in the district court. See note 4, *supra*; see also Gov't C.A. Br. 13 (pointing out that petitioner never articulated why the district court erred in dismissing petitioner's exhausted claim, and explaining that the district court properly dismissed it because it failed to state a claim upon which relief could be granted). Petitioner maintains (Pet. 13, 16-17) that she did not abandon the exhausted claim, but she ultimately rests, instead, on her argument that exhaustion is not a jurisdictional prerequisite to her suit. Pet. 17. And, petitioner concedes (Pet. 8) that, in her amended complaint in district court, she added the new, unexhausted claim that "she had personally been the victim of quid pro quo sexual harassment and discrimination based on gender."

failure to interview several witnesses identified by petitioner, and his failure to inform petitioner about a pending complaint by another employee regarding the same alleged relationship between a supervisor and the co-worker.

The court of appeals declined to address petitioner's challenge to the adequacy of the administrative investigation because petitioner had not raised the issue in the district court. Pet. App. B at 13 n.3. This Court should similarly decline to review the issue that was not properly raised in the district court and not passed on by the court of appeals. *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court[s].") (quoting *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976)).

3. Petitioner also seeks (Pet. 25-26) a ruling by this Court that a claim of quid pro quo sexual harassment discrimination can be based on a claim by a qualified female employee who was denied a promotion because of favoritism by a supervisor toward another female employee who engaged in coerced sexual conduct with him. Petitioner cites the EEOC's policy guidance governing such a claim. Pet. 26.

In light of the district court's ruling dismissing the case for failure to exhaust administrative remedies, it did not address the issue. Similarly, the court of appeals ultimately did not reach the issue, although it had requested supplemental briefing. See Pet. 25. The issue therefore does not warrant review by this Court. See *Taylor*, 503 U.S. at 646.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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